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No. 71-663

In the Supreme Court of the United States

OCTOBER TERM, 1971

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MARIE WELLS FLANAGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-3) is reported at 445 F. 2d 263.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1971. A petition for rehearing was denied on September 16, 1971. Mr. Chief Justice Berger extended the time for filing a petition for a writ of certiorari to November 15, 1971, and on November 13, 1971, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was sufficient evidence identifying petitioner as a participant in the crime to support the verdict.

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2. Whether certain pretrial identification procedures were proper.

3. Whether petitioner, who aided and abetted an armed robbery, could be found guilty of the unaggravated form of the offense.

STATEMENT

Petitioner and her husband, Jack Wesley Flanagan, were jointly indicted in a single count for aggravated robbery of a federally insured bank in violation of 18 U.S.C. 2113 (a) and (d).[1] After a joint jury trial in the United States District Court for the Northern District of Texas, Jack Flanagan was convicted as charged and sentenced to twenty-five years' imprisonment. Petitioner was convicted of bank robbery by force in violation of 18 U.S.C. 2113(a), but was not found guilty of the aggravated form of the offense under 18 U.S.C. 2113(d) (Tr. 695–696; see also Vol. I, pp. 19–20). She was sentenced to imprisonment for ten years. The court of appeals affirmed both convictions *per curiam*. (Pet. App. A–1 to A–3.)

The evidence adduced at trial showed that Samuel Smith, a bank porter of the Bank of Dallas, accompanied by Lillie Mae Doyal, a teller, was walking across the bank's parking lot carrying two boxes of money from the tellers' drive-in cages to the main bank building when a 1966 Chevrolet pulled into the parking lot and stopped six to eight feet in front of the two bank employees (Tr. 44, 47, 57, 119). A man

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[1] The indictment is found in Volume I, page 1, of the three volume record which we are lodging with the Clerk of this Court. "Tr." refers to the trial transcript, which is found in Volumes II and III of the record.

in the car pointed a gun at Smith and ordered him to drop the boxes (Tr. 48–49). The man loaded the boxes into the car and the car pulled away (Tr. 49–50).

Jack Flanagan was positively identified as the armed robber by Smith and Mrs. Doyal (Tr. 78, 106, 111–112). Mrs. Doyal identified petitioner as the driver (Tr. 113). Her view of the driver through the car window was unobstructed (Tr. 100). Although the driver was wearing sunglasses and a head scarf, Mrs. Doyal noticed a strand of blond hair protruding from the scarf (Tr. 104). At one point the driver, who had been looking in the rear-view mirror, turned sideways and Mrs. Doyal had a direct view of her nose and face, which Mrs. Doyal described as a "baby doll face, a small face" (Tr. 103, 105). About two weeks after the robbery, Mrs. Doyal identified petitioner from a series of photographs shown to her by an F.B.I. agent (Tr. 139). Later, on November 17, 1969, when petitioner and Jack Flanagan made a deposit at Mrs. Doyal's drive-in window, Mrs. Doyal recognized them immediately as the robbers (Tr. 109–113).

ARGUMENT

1. The jury could properly credit Mrs. Doyal's positive identification of petitioner; there was thus sufficient evidence identifying petitioner as a participant in the crime. There was no showing that the procedures employed by the F.B.I. agent in showing Mrs. Doyal the series of photographs after the crime were improperly suggestive. No one had talked about petitioner to Mrs. Doyal nor did anyone suggest to

her which photograph to select (Tr. 131, 139). Defense counsel at trial made no objection to the use of photographs to identify petitioner.

2. Petitioner contends that the evidence against her was insufficient and her conviction under 18 U.S.C. 2113(a) void as a matter of law since, if she aided and abetted the robbery at all, she aided and abetted the aggravated form of the offense defined in Section 2113(d). Since Jack Flanagan did carry a gun, petitioner could have been convicted of the aggravated form of the offense. See 18 U.S.C. 2. Section 2113(d) does not create a separate offense, but merely provides for additional punishment when, in the commission of an offense under Section 2113(a), life is put in jeopardy by the use of a deadly weapon. See *Holiday* v. *Johnson,* 313 U.S. 342, 349. The jury, in the exercise of its power of lenity, could decide that petitioner should not be held responsible for the gun she did not carry. At most the verdict is inconsistent, a factor which does not invalidate it. See *Dunn* v. *United States,* 284 U.S. 390.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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